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January 14, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: September 29, 2004
Case No.: TIA-0228

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late husband (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be dismissed as moot.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. ' ' 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. ' 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept

¹ www.eh.doe.gov/advocacy

a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a welder and welder inspector at the DOE's Oak Ridge site. He worked at the plant for nearly 36 years, in 1944 and from 1946 to 1981.

The Applicant filed an application for chronic beryllium disease (CBD) with the DOL under Subpart B and received a positive determination.

The Applicant also filed an application with the OWA, requesting physician panel review of CBD. The Physician Panel rendered a negative determination on the claimed illness. The Panel did not find that the Worker was exposed to beryllium or that his illness was consistent with beryllium disease. The OWA accepted the Panel's negative determination, and the Applicant appealed. We granted the appeal. We found that the Panel's explanation of its determination lacked sufficient detail. Accordingly, we remanded the application for further consideration.

In response to the remand, the Panel issued a new determination. The Panel stated that the Worker's medical records did not provide evidence of CBD. The Panel further stated that the Worker had a febrile illness of unknown origin and that such an illness was not consistent with CBD.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic

substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding.²

Subpart E has rendered moot the physician panel determination. A positive DOL Subpart B determination meets the Subpart E requirement that the illness be related to toxic exposure during employment at DOE. The Applicant received a positive DOL Subpart B determination for CBD. Accordingly, further consideration of alleged panel errors is not necessary.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0228 be, and hereby is, dismissed.
- (2) This is a final order of the Department of Energy

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 14, 2005

² 10 C.F.R. § 852.12.